IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re ONE RESIDENCE LOCATED AT 2157 W. JACKALOPE PL (TUC), PASEO VISTA LOT 225, RECORDED IN THE OFFICE OF THE PIMA COUNTY RECORDER IN DOCKET 12084 AT PAGE 2429, INCLUDING ALL BUILDINGS, FIXTURES, STRUCTURES AND APPURTENANCES THERETO; 2004 HUMMER H2 VIN: 5GRGN23U14H119952 AZ LIC: S350878; UNIT AND 2 WAY RADIO; ROYAL DIGITAL SCALE MOD EX130; KILO TECH SCALE; THREE (3) CELL PHONES,	2 CA-CV 2005-0106 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20044898

Honorable John F. Kelly, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Thomas J. Rankin — Tucson
Attorneys for Plaintiff/Appellant

John D. Kaufmann — Tucson
Attorney for Claimants/Appellees

P E L A N D E R, Chief Judge.

¶1 In this appeal from the trial court's in rem order, entered after a bench trial, the state contends the court erred in entering judgment in favor of appellees Millennium Motors, LLC, and its owners, Mark Begurski and Jami Strey, husband and wife (collectively, "Begurski"). The state argues the trial court failed to consider all the evidence before it and erred in finding that the state had not proved by a preponderance of the evidence that Begurksi had committed the alleged criminal acts leading to the initial seizure of property. Finding no error, we affirm.

BACKGROUND

¶2 As to factual issues on an appeal from an in rem order, "we view the evidence in the light most favorable to upholding the judgment." *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 2, 18 P.3d 85, 87 (App. 2000).[1] Begurski and Strey own Millennium

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[1]We note that, throughout most of its briefs, the state fails to properly cite the record as required by Rule 13(a)(4), Ariz. R. Civ. App. P., 17B A.R.S. We caution counsel that such omissions may result in this court's dismissing an appeal or disregarding sections of a brief that fail to comply with the rules. *See State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990); *Flood Control Dist. v. Conlin*, 148 Ariz. 66, 68, 712 P.2d 979, 981 (App. 1985).

Motors, a Tucson car dealership. In 2004, the Counter Narcotics Alliance (CNA) was investigating a marijuana distribution ring in Pima County. During that investigation, officers seized a 2004 Hummer H2, purchased from Millennium Motors, from a residence apparently owned by Maria Isabel Dominguez. CNA officers investigated the purchase of the Hummer and also listened to and tape-recorded a number of telephone calls between Dominguez, her boyfriend (Miguel Fragoso), and Begurski, as well as their attorney, Hector Montoya.

¶3 Dominguez and Fragoso previously had purchased vehicles from Begurski and approached him about purchasing a Hummer H2. The couple ultimately purchased the Hummer from Millennium in mid-June 2004 for $59,374.84. In their sales agreement, the parties agreed to a cash down payment of $10,000 plus a 2002 Mercedes, valued at $20,000, as a trade-in, leaving a balance due of $29,374.84. Millennium placed a lien on the Hummer in that amount.

¶4 At some point, several issues arose relating to the Mercedes, the most important of which was an incorrect odometer reading. Although the odometer showed the car had approximately 15,900 miles, the title showed 75,000 miles. The Department of Motor Vehicles corrected the title in its records sometime between June 22 and July 16, but CARFAX, a private provider of vehicle history information commonly used by car dealers, had not. Begurski testified that he had not wanted to take the Mercedes in trade "until all the problems [were] corrected and resolved." Therefore, he required the purchasers to "replace the amount of the Mercedes into a down payment." The couple then gave Begurski

a cashier's check for the $20,000 difference. The new agreement, signed June 25, 2004, showed the check payment and a balance due of $29,374.84. Begurski, however, also kept the Mercedes as "physical security."

¶5 On July 4, the Hummer was involved in a shooting incident and, as noted above, was subsequently seized. Begurski learned of the seizure and spoke with Sergeant Kimberly Jones three days later. He told Jones that he had a lien on the vehicle for "$29,374 and change." Begurski, however, eventually sold the Mercedes to a third party after full disclosure on July 16, although the CARFAX report did not show the corrected mileage until July 20. Begurski testified that, after he sold the Mercedes, "the amount was credited towards the lien amount." He also testified that he had reported the sale to Jones and the police department's financial investigator, telling him that "the balance [owed] was $9,400."

¶6 In August 2004, the state seized and placed liens on various property, including numerous vehicles, of Millennium Motors. In a separate cause number, eventually consolidated with this cause, the state also filed a notice of pending forfeiture on the Hummer H2. The state filed a complaint, alleging that the seized property was subject to forfeiture "because it [was] the proceeds of and/or was used or intended to be used to commit or facilitate the commission of . . . conduct in violation of the Racketeering, Drug and Forfeiture Chapters of Title 13 of the Arizona Revised Statutes," including, inter alia, various drug- related crimes, fraud, money laundering, and conspiracy. According to the

state, Begurski "misrepresent[ed] a $29,000 interest to [Jones]" "to benefit himself and Millennium Motors and . . . Dominguez."

¶7 Begurski filed a notice of claim pursuant to A.R.S. § 13-4311(E) and petitioned for an order to show cause (OSC) pursuant to A.R.S. § 13-4310(B), challenging the existence of probable cause to seize the property. After an OSC hearing, the trial court initially found no probable cause for seizure of the property, except the interest in the Hummer, as to which Begurski did not challenge probable cause. The state moved for reconsideration of that ruling, and the trial court eventually reversed its decision after the forfeiture trial.[2] The court ultimately ruled that probable cause existed to seize the property for forfeiture but that the state had not proved by a preponderance of the evidence that Begurski had committed the underlying, alleged offenses. This appeal followed the trial court's entry of judgment in favor of Millenium Motors and Begurski.

DISCUSSION

I. Scope of Evidence

¶8 In a somewhat confusing argument, the state first contends "[t]he trial court committed error when it did not consider the proper scope of evidence." The state maintains that "[t]he trial court limited its determination of whether fraud occurred to the time of [Begurski's] first conversation with Sgt. Jones on July 7, 2004." And, the state argues, "[i]t

[2]The parties agreed that the trial court could consider all evidence presented at the OSC hearing as part of the trial.

was immediately after the point where the trial court cut off its evidence review that [Begurski] willingly and knowingly entered into a criminal enterprise to commit fraud."

¶9 The state primarily relies on several telephone calls that occurred after Begurski's July 7 conversation with Jones as evidence that he had "created and directed a plan to defraud the State." But the record does not support the state's contention that the trial court failed to consider those calls in reaching its decision. In fact, the judgment states that "the testimony and exhibits from the OSC" hearing were "incorporated into the trial." And the court further stated that it had "considered all the evidence and exhibits." In sum, we agree with Begurski that "[t]here is nothing in the record that indicates the Trial Court did not consider all evidence presented."

¶10 Additionally, we find misplaced the state's reliance on *In re $26,980.00 U.S. Currency*, 193 Ariz. 427, 973 P.2d 1184 (App. 1998). In that case, this court reversed a summary judgment against the state, concluding that the trial court had erred in precluding forfeiture based on its finding that police officers had violated the claimant's Fourth Amendment rights in seizing the property. *Id.* ¶¶ 6, 8, 11. We stated that "the applicable forfeiture statutes do not require a warrant for all seizures, nor do they automatically invalidate forfeiture claims stemming from warrantless seizures." *Id.* ¶ 9. In providing guidance to the trial court on remand, we also instructed it to consider all evidence "'then exist[ing],' at the time of the hearing, in determining probable cause" for forfeiture, rather than just the evidence known to officers at the time they initially removed the property. *Id.*

¶ 15, *quoting* A.R.S. §13-4310(B) (alteration in *In re $26,980.00*). As noted above, however, the trial court here stated it had "considered all the evidence and exhibits" in determining the ultimate issue of whether the state's forfeiture claim was valid. And, again, we have no basis for concluding that the trial court actually failed to do so.

¶11 The state also maintains the trial court made "inconsistent and erroneous . . . findings" that "are not supported by the clear weight of the evidence."[3] In its judgment, the trial court found that "there was reasonable cause for seizure for forfeiture, the filing of forfeiture liens and complaint in the . . . matter . . . of the property of Millennium Motors and the real property and bond of Begurski and Strey."[4] But the court also found "that the State failed to prove by a preponderance of evidence that Begurski committed a scheme to defraud" and entered judgment in favor of Begurski, ordering the return of the property.

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[3]The state does not cite the record or otherwise clarify which ruling it is actually addressing in its argument on this point, as required by rule. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. But, based on its argument, we presume it is referring to the trial court's minute entry ruling dated March 3, 2005, and the final judgment filed March 24, 2005.

[4]In its minute entry ruling dated March 3, 2005, the trial court, on reconsideration of its OSC ruling, ruled that "the state established probable cause for the forfeiture of the property" in question. In its subsequent, final judgment, however, the court ruled "there was reasonable cause for seizure for forfeiture" of the property. The state faults Begurski for those discrepancies and asserts that the trial court actually "found probable cause for the seizure AND forfeiture" of the property in question. We do not find those discrepancies material, however, because the court apparently used the terms "probable cause" and "reasonable cause" interchangeably, because Begurski agreed those terms are "basically the same," and because the context suggests that the court used the word "forfeiture" in its minute entry to mean "seizure for forfeiture." *See* A.R.S. §§ 13-4305, 13-4310.

¶12 The state argues that those findings "represent[] clear error by the trial court" because they are "diametrically opposed" to the trial court's post-trial, prejudgment finding that "the state established probable cause" that Millenium Motors, "purportedly" through its owner Begurski, had "facilitated and was the instrumentality of an alleged scheme to defraud." And, the state argues, "[n]o intervening evidence occurred other than the testimony of Mark Begurski." The state also points to the "conflicting accounts" Begurski gave in "the OSC hearing, his deposition, and at trial . . . of how the transaction occurred."

¶13 First, we note that this argument essentially invites us to reweigh the evidence presented at trial. This we will not do. *See In re $315,900.00 U.S. Currency*, 183 Ariz. 208, 211, 902 P.2d 351, 354 (App. 1995); *see also Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986) ("On appeal, an appellate court should not weigh conflicting evidence."). Additionally, the state's argument appears to confuse a trial court's proper application of two different standards of review to different phases of the forfeiture proceeding. Under A.R.S. §§ 13-4305 and 13-4310, the court must first determine if the state had probable cause to seize the subject property for forfeiture.[5] That is, as this court stated in *In re $315,900.00*,

[5]As stated in note 4, *supra*, the terms "probable cause" and "reasonable cause" are generally used interchangeably to mean "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime" or "[a] reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself." *Black's Law Dictionary* 1239 (8th ed. 2004).

> "cause to believe the substantive standard has been satisfied." . . . "To meet this burden, the state must demonstrate reasonable grounds for its belief that the property is subject to forfeiture, supported by more than a mere suspicion, but less than prima facie proof."

183 Ariz. at 211, 902 P.2d at 354, *quoting In re 1986 Chevrolet Corvette*, 183 Ariz. 637, 640, 905 P.2d 1372, 1375 (1994).

¶14 Next, in an in rem forfeiture proceeding, the court must determine if the state has proven by a preponderance of the evidence "that the property is subject to forfeiture under [A.R.S.] §13-4304." A.R.S. § 13-4311(M). "[T]his requires that 'the trier of fact find the existence of the contested fact to be more probable than not.'" *In re Estate of Killen*, 188 Ariz. 562, 568, 937 P.2d 1368, 1374 (App. 1996), *quoting In re Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983). In other words, "a preponderance is usually determined by the 'greater weight of all evidence' presented." *Id.*, *quoting Black's Law Dictionary* 1182 (6th ed. 1990). This standard thus requires a greater quantum of evidence than the standard of probable cause, which actually requires even "less than prima facie proof." *In re $315,900.00*, 183 Ariz. at 211, 902 P.2d at 354. In sum, the trial court's rulings are not, as the state contends, "inconsistent and erroneous."

II. Sufficiency of evidence

¶15 The state next contends "[t]he trial court committed error when it concluded that the state had not proved by a preponderance of the evidence that the property was subject to forfeiture." On appeal, "we do not reweigh conflicting evidence or redetermine

the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999); *see also In re $26,980.00*, 199 Ariz. 291, ¶ 9, 18 P.3d at 89; *cf. Am. Sur. Co. of New York v. Nash*, 95 Ariz. 271, 278, 389 P.2d 266, 270 (1964). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d at 709. And we will uphold the trial court's findings unless no substantial evidence supports them, even when conflicting evidence exists. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 14, 961 P.2d 449, 451 (1998).

¶16 On this point, the state again argues the trial court did not "consider all of the evidence before it as presented by the State." The state maintains that "[t]he only way the trial court could make its determination was to limit its consideration of evidence." The state also contends that it presented "overwhelming evidence" of "fraud, racketeering and criminal enterprise" and that, other than his own testimony, Begurski presented "little or no evidence to refute" the state's claims. But, as outlined above, the record shows that the trial court did consider all the evidence before it. And the evidence, viewed in the light most favorable to upholding the trial court's judgment, reasonably supports the court's decision.

¶17 Additionally, although the state characterizes Begurski's testimony as "disingenuous[]," the trial court apparently found it credible. And "the weighing of evidence and the assessment of witness credibility [are] matters clearly within the province

of the trier of fact." *In re $315,900.00*, 183 Ariz. at 211, 902 P.2d at 354. Furthermore, when asked by the court if the state had "any evidence that . . . Begurski knew he was dealing with drug dealers," one of the lead detectives in the case testified that there was "[s]traightforwardly very little, other than [Dominguez's] explaining to . . . Begurski about the seizure" after the fact.

¶18 Finally, with respect to the state's allegations that Begurski fraudulently represented his interest in the Hummer as $29,000, Begurski presented evidence that he had not accepted the Mercedes trade-in because of the problems with CARFAX until he sold the vehicle on July 16. Likewise, the trial court found that Begurski actually had an interest of $29,000 in the Hummer until that date and, therefore, that he had not misrepresented that fact to Jones on July 7, as the state alleged. In sum, contrary to the state's assertions, we cannot say the record lacks any substantial evidence to justify the trial court's judgment; therefore, we must affirm it. *See Hutcherson*, 192 Ariz. 51, ¶ 14, 961 P.2d at 451. Accordingly, "we uphold the trial court's finding that [the state] had not satisfied its burden of proving by a preponderance of the evidence that the seized [property was] subject to forfeiture because the finding is supported by some evidence and is not clearly erroneous." *In re $26,980.00*, 199 Ariz. 291, ¶ 23, 18 P.3d at 92.

DISPOSITION

¶19 The judgment of the trial court is affirmed. Begurski has requested attorney fees under Rule 25, Ariz. R. Civ. App. P., 17B A.R.S., contending that the state's appeal is

"frivolous," pursued "for the purpose of delay," and "lack[s] candor." Although we find this appeal without merit, it has not crossed the "very fine" line between "an appeal which has no merit and one which is frivolous." *Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988). We therefore deny that request.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge